Supreme Court, U.S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1980
NO. 80-565

AMELIA FLOHR HEYL, As
Personal Representative of the Estate
of Nancy Zimmerman, Deceased, and As
Guardian of Kim Ann Zimmerman and
Lisa Marie Zimmerman, Minors,

Petitioner/Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,

Respondent/Defendant.

---

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

CHRISTIAN D. KEEDY
SMATHERS & THOMPSON
1301 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33131
Telephone: (305) 379-6523

Counsel for Respondent/
Defendant, Carnival Cruise
Lines, Inc.

November, 1980

---

# INDEX


| | Page |
|---|---|
| TABLE OF CITATIONS . . . . . | ii-v |
| REASONS FOR DENYING WRIT . . . . . | 1 |
| STATEMENT OF THE CASE . . . . . | 2 |
| ARGUMENT SUPPORTING REASONS FOR DENYING WRIT . . . . . | 5 |
| CONCLUSION . . . . . | 13 |
| APPENDIX | |
| A. Plaintiff's Motion for Leave to File Amendment to Complaint . . . | A2 |
| B. Order on Plaintiff's Motion for Leave to File Amendment to Complaint, Defendant's Motion to Strike Plaintiff's Demand for Jury Trial, Defendant's Motion to Compel Production of Documents . . . . . | A4 |
| C. Pretrial Stipulation . . . . . | A6 |
| D. Decision of the United States Court of Appeals for the Fifth Circuit . . . . . | A15 |
| E. Order on Plaintiff's Renewed Motion to Amend Her Complaint and Plaintiff's Motion to Amend Complaint to Bring a Pendant Claim . . . . . | A18 |

# CITATIONS


| | Page |
|---|---|
| CASES: | |
| American Export Lines, Inc. v. Alvez, ___ U.S. ___, 100 S.Ct. 1673 (1980) . . . . . | 12 |
| Blumenthal v. United States, 189 F. Supp. 439 (E.D. Pa. 1960), aff'd, 306 F.2d 16 (3d Cir. 1962). . . . | 11 |
| Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968) . . . | 11 |
| City of Lakeland Florida v. Union Oil Co. of California, 352 F. Supp. 758 (M.D. Fla. 1973) . . | 10 |
| Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963) . . . . . | 6 |
| Cunningham v. Bethlehem Steel Co., 231 F. Supp. 934 (S.D.N.Y. 1964) . . . | 11 |
| Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971), cert. denied, 404 U.S. 995 (1971) . . . . . | 6 |
| Egan v. Donaldson Atlantic Line, Ltd., 37 F. Supp. 909 (S.D.N.Y. 1941) . . . | 11 |
| Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976) . . . . | 10 |

CITATIONS
(Continued)


| | Page |
|---|---|
| CASES: | |
| Green v. Ross, 481 F.2d 102 (5th Cir. 1973), cert. denied, 414 U.S. 1068 (1973) . . | 9 |
| Harris v. Johnson, 345 F. Supp. 516 (N.D. Miss. 1972) . . | 6 |
| Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955), cert. dismissed, 352 U.S. 802 (1956) . . . . | 11 |
| Iafrate v. Compagnie Generale Transatlantique, 106 F. Supp. 619 (S.D.N.Y. 1952) . . | 11 |
| In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974) . . . . . | 11 |
| Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F.2d 694 (3d Cir. 1952) . . . . . | 6 |
| Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y.1971) . . . | 11 |
| Kunkel v. United States, 140 F. Supp. 591 (S.D. Cal. 1956) . . | 11 |
| Laird v. Air Carrier Engine Service, Inc., 263 F.2d 948 (5th Cir. 1959) . . . . . | 9 |

CITATIONS
(Continued)


| | Page |
|---|---|
| CASES: | |
| Lang v. Elm City Construction Co., 217 F. Supp. 873 (D. Conn. 1963), aff'd 324 F.2d 235 (2d Cir. 1963) . . . | 6 |
| Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931) . . . . . | 6 |
| Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) . . . . . | 4, 10, 12 |
| Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) . . . . . | 12 |
| New Orleans Furniture Manufacturing Co. v. Great American Insurance Co., 413 F.2d 1278 (5th Cir. 1969) . . . . | 10 |
| Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957) . . . . . | 12 |
| Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683 (N.D. Ill. 1964) . . . | 11 |
| Ridgedell v. Olympic Towing Corp., 205 F. Supp. 952 (E.D. La. 1962) . . . | 11 |
| Romero v. International Terminal Operating Co., 358 U.S. 354, 371, n. 28 (1959) . . . | 4, 11, 12 |

CITATIONS
(Continued)


| | Page |
|---|---|
| CASES: | |
| Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958), cert. denied, 358 U.S. 838 (1958) . . | 11 |
| STATUTES: | |
| 28 U.S.C. Rules of the Supreme Court, Rule 19 . . . . . | 13 |
| 46 U.S.C. §§ 761-768 . . . . . | 2, 3, 11 |
| 46 U.S.C. § 688 . . . . . | 2, 11 |
| OTHER AUTHORITIES: | |
| G. Gilmore & C. Black, The Law of Admiralty, 24 n. 79, 40 n. 133 (2d ed. 1975). . . | 11 |

## REASONS FOR DENYING THE WRIT

I.

DIVERSITY OF CITIZENSHIP BETWEEN THE PETITIONER AND RESPONDENT HAS NEVER BEEN ESTABLISHED IN THIS CASE, SO THERE IS NO PROPER RECORD FOR A DETERMINATION BY THIS COURT OF THE ISSUE OF WHETHER THE PETITIONER COULD HAVE BROUGHT THE SUIT IN DIVERSITY RATHER THAN IN ADMIRALTY.

II.

PETITIONER AND RESPONDENT FILED A PRETRIAL STIPULATION IN THE DISTRICT COURT JOINTLY STIPULATING ADMIRALTY AS THE BASIS OF FEDERAL JURISDICTION. THE PETITIONER THEREBY WAIVED THE ISSUE OF DIVERSITY JURISDICTION WHICH IS ACCORDINGLY INAPPROPRIATE SUBJECT MATTER FOR A PETITION FOR CERTIORARI TO THIS COURT.

III.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS FOLLOWS APPLICABLE DECISIONS OF THIS COURT, SO THERE IS NO CONFLICT BASIS FOR GRANTING THIS PETITION.

## STATEMENT OF THE CASE

The Respondent recites a statement of the case because the Petitioner's statement of the case contains unnecessary detail and omits significant facts.

The Plaintiff/Petitioner in this suit is Amelia Flohr Heyl, personal representative of the estate and guardian of the minor daughters of the decedent, Nancy Zimmerman, a passenger who died aboard the cruise ship "CARNIVALE". The Defendant/Respondent is Carnival Cruise Lines, Inc., operator of the cruise ship line.

This suit arises from a cruise ship passenger's death which occurred on the high seas. It has been stipulated that the alleged negligent conduct occurred on the high seas. (R. 210). In the original Complaint the Petitioner alleged the Death on the High Seas Act, 46 U.S.C. §§ 761-768, and general maritime law as the basis of federal jurisdiction. 1/ The Petitioner subsequently filed a motion seeking leave to amend the Complaint to substitute diversity as the basis of federal jurisdiction (R. 79; A. 2). That motion was denied on grounds that the Petitioner's exclusive remedy was under the Death on the

---

1/ The Complaint actually contained an incorrect reference to the Jones Act, 46 U.S.C. § 688 (R. 1), which was inappropriate because the Plaintiff's decedent was a passenger rather than a seaman, and the Plaintiff subsequently indicated that the intent had been to refer to the Death on the High Seas Act. (Petition, page 2).

High Seas Act, and suits under that Act must be brought in admiralty. (R. 90; A. 4).

The case was scheduled for trial, and pursuant to a pretrial order (R. 42-43), the parties' counsel jointly prepared and filed a pretrial stipulation (R. 210-225; A. 6-14). Therein, the Petitioner and the Respondent jointly stipulated admiralty as the basis for federal jurisdiction (R. 210; A. F) and the Death on the High Seas Act, 46 U.S.C. §§ 761-768, as the controlling law. (R. 210-215; A. 7, 12).

A trial was conducted before the district court sitting in admiralty. The court, by memorandum opinion dated September 17, 1979 (R. 442-449), found for the Respondent stating that the Petitioner had failed to prove, by the greater weight of the evidence, that the Respondent, its officers or agents, were guilty of negligence which caused the death of the Petitioner's decedent. (R. 449).

At no time during the proceedings before the district court was evidence of the citizenship of the Petitioner or of the Respondent placed on the record.

The Petitioner filed a motion for new trial solely on the basis of the trial court's denial of the motion to amend to allege diversity jurisdiction. (R. 450-458). The motion for new trial was denied (Supplemental Record on Appeal), and the Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Petitioner framed the single issue on appeal as follows:

> Whether the lower court erred in striking Plaintiff's demand for trial by jury and denying Plaintiff's motion to amend

its complaint to allege diversity of citizenship as the sole basis of federal jurisdiction when no prejudice to Defendant was alleged by Defendant or found by the court and the sole basis for the denying of the amendment to the complaint was that it would be futile since Plaintiff would still not be entitled to a trial by jury?

The Fifth Circuit entered a per curiam affirmance on August 20, 1980 with a brief written opinion. (A. 15-17). The Fifth Circuit noted that the Petitioner and Respondent had stipulated admiralty as the basis of federal jurisdiction and the Death On The High Seas Act ("DOHSA") as the controlling law. (A. 16). The Fifth Circuit then cited this Court's holding in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) that DOHSA provides the exclusive remedy for a wrongful death on the high seas, and accordingly found that the district court did not err in overruling the Petitioner's motion for leave to amend to substitute diversity for admiralty jurisdiction. (A. 17). The Fifth Circuit stated that since it was a DOHSA case, it was properly tried in admiralty without a jury, citing Romero v. International Operating Co., 358 U.S. 354, 371, n. 28 (1959). (A. 17).

The Petitioner thereupon filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## ARGUMENT SUPPORTING REASONS FOR DENYING WRIT

### I.

### DIVERSITY OF CITIZENSHIP BETWEEN THE PETITIONER AND RESPONDENT HAS NEVER BEEN ESTABLISHED IN THIS CASE, SO THERE IS NO PROPER RECORD FOR A DETERMINATION BY THIS COURT OF THE ISSUE OF WHETHER THE PETITIONER COULD HAVE BROUGHT THE SUIT IN DIVERSITY RATHER THAN IN ADMIRALTY.

Although the Petitioner has submitted several versions of the Question Presented to this Court, the essence of the Petitioner's inquiry is whether the Petitioner could have brought this suit in diversity rather than in admiralty. However, the Petitioner has never established on the record facts demonstrating that diversity actually exists in this case. No evidence concerning the citizenship of the Petitioner or of the Respondent appears in the record of this cause, except in unsupported statements made by Petitioner's counsel in its brief to the Fifth Circuit and in this Petition. (See Petition, page 2). No proffer of evidence of citizenship was made at trial or at any other time in the proceedings below to preserve this issue for appellate review.

Since diversity between the Petitioner and Respondent has not been established on the record, the Petitioner is asking this Court to address a hypothetical question, i.e. if diversity existed in this case, could the Petitioner's suit have been brought in diversity?

The Petitioner has cited as error the district court's denial of her motion to amend the Complaint to substitute diversity allegations. However, even had the proposed amendment been allowed, no diversity would have been established. The relevant portions of the Petitioner's proposed amendment to the Complaint were:

> 2. The Court has has jurisdiction over this claim pursuant to 28 U.S.C.A § 1332, Diversity jurisdiction.
>
> 3. The defendant, CARNIVAL CRUISE LINES, INC., is a foreign corporation with principal place of business in Miami, Dade County, Florida. The plaintiff's decedent was a resident of Fort Worth, Turrant County, Texas where her estate is being probated through her personal representative Amelia Flohr Heyl.

(R. 81, A. 2) (emphasis added). This attempt to allege diversity jurisdiction was prima facie deficient in two respects. Firstly, allegations of residency are not sufficient to establish diversity jurisdiction. Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971), cert. denied, 404 U.S. 995 (1971); Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963). Secondly, for purposes of determining diversity in this case brought by the Petitioner as representative of an estate, it is the citizenship of the Petitioner, and not that of the Petitioner's decedent, which is relevant and which should have been established on the record. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931); Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F.2d 694 (3d Cir. 1952); Harris v. Johnson, 345 F. Supp. 516 (N.D. Miss. 1972); Lang v. Elm City Construction Co., 217 F. Supp. 873 (D. Conn. 1963), aff'd 324 F.2d 235 (2d Cir. 1963).

Again, the question which the Petitioner is presenting to this Court is whether the Petitioner could have brought her suit in diversity. Since the Petitioner has failed to present a record establishing that diversity does in fact exist, the Question Presented in the Petition could be resolved only by rendering an impermissible advisory opinion. It is submitted that consideration by this Court of the issue raised is not proper on the record presented for review, and this Petition should accordingly be denied.

II.

PETITIONER AND RESPONDENT FILED A PRETRIAL STIPULATION IN THE DISTRICT COURT JOINTLY STIPULATING ADMIRALTY AS THE BASIS OF FEDERAL JURISDICTION. THE PETITIONER THEREBY WAIVED THE ISSUE OF DIVERSITY JURISDICTION WHICH ACCORDINGLY IS INAPPROPRIATE SUBJECT MATTER FOR A PETITION FOR CERTIORARI TO THIS COURT.

After extended preparation for trial by both parties in this cause, including various motions directed to the pleadings and discovery, the case was set for trial. (R. 42). Approximately one month prior to the trial date, counsel for the parties met pursuant to order of the district court (R. 42-43) and prepared a joint pretrial stipulation setting out, inter alia, the basis of federal jurisdiction, issues of law as to which the parties were in agreement, and issues of law which remained for determination by the court. (R. 210-225; A. 6-14).

As to the basis of federal jurisdiction, the parties stipulated:

> A. 28 U.S.C. § 1333, Admiralty and maritime case;
>
> B. Rule 9(H) of the Federal Rules of Civil Procedure;
>
> C. 46 U.S.C. § 761, Death on the High Seas by Wrongful Act;
>
> D. Alleged tortious conduct occurred on the high seas;
>
> E. Suit in admiralty.

(R. 210; A. 7).

The parties further stipulated that they were in agreement as to the following issues of law:

> A. This action is brought pursuant to the Death on the High Seas Act, 46 U.S.C. §§ 761-768;
>
> B. The law applicable to damages is governed by 46 U.S.C. §§ 761-762;
>
> C. The law applicable to comparative negligence is governed by 46 U.S.C. § 766;
>
> D. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are applicable to this case;
>
> E. The doctrine of comparative negligence applies here.

(R. 215; A. 12). The parties stipulated that the only issues of law remaining for determination by the court were related to the applicability of the seaworthiness warranty doctrine and the liability of a shipowner for the negligence of the ship's physician. (R. 215; A. 12).

The joint pretrial stipulation was filed with the district court on March 8, 1979 (R. 210, A. 6) and counsel for the parties subsequently attended a pretrial conference before the court. (R. 261). 2/ Petitioner's counsel did not raise the issue of diversity in the pretrial stipulation. On the contrary, Petitioner's counsel stipulated that admiralty was the basis of federal jurisdiction and that the provisions of the Death on the High Seas Act would govern as to proof of facts on issues such as comparative negligence and measure of damages. The Petitioner did not at any time seek leave from the district court to amend or modify the pretrial stipulation.

The Petitioner sought in her appeal to the Fifth Circuit and now seeks in this Petition to raise an issue in direct conflict with the stipulations made in the pretrial stipulation; specifically, the issue of substituting diversity for admiralty as the basis of federal jurisdiction. Pretrial stipulations are absolutely binding, Laird v. Air Carrier Engine Service, Inc., 263 F.2d 948 (5th

---

2/ The Petitioner made an oral motion at the pretrial conference seeking leave to amend the Complaint to bring the action under general maritime law. (R. 261; A. 18). The district court treated the motion as an attempt to obtain a jury trial (R. 261; A 18), and properly denied the motion as futile; where general maritime law is the sole basis of federal jurisdiction, the suit must be tried in admiralty without a jury. Green v. Ross, 481 F.2d 102 (5th Cir. 1973), cert. denied, 414 U.S. 1068 (1973). Furthermore, the Complaint had already alleged maritime law (R. 1), so the amendment would have been senseless as well as futile.

Cir. 1959), and absent modification, are not an appropriate issue for appeal. Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976). Pretrial stipulations supersede prior pleadings, City of Lakeland Florida v. Union Oil Co. of California, 352 F. Supp. 758 (M.D. Fla. 1973), and matters agreed to by the parties in a pretrial stipulation are waived in the trial court and may not be pursued on appeal. See New Orleans Furniture Manufacturing Co. v. Great American Insurance Co., 413 F.2d 1278 (5th Cir. 1969).

The pretrial stipulation filed with the district court in this case is absolutely binding on the Petitioner; it stands - unmodified - on the record. (R. 210-225; A. 6-14). Having stipulated admiralty as the basis of federal jurisdiction, the Petitioner waived the issue of whether her suit could have been brought in diversity. Since the issue has been waived by the Petitioner, it is inappropriate subject matter for exercise of this Court's certiorari jurisdiction.

## III.

## THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS FOLLOWS APPLICABLE DECISIONS OF THIS COURT, SO THERE IS NO CONFLICT BASIS FOR GRANTING THIS PETITION.

This is a suit for the death of a cruise ship passenger which occurred on the high seas. The parties to the suit stipulated that the alleged tortious conduct occurred on the high seas. (R. 210; A. 7). Under this Court's decision in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), the Death on the High Seas Act, 436

U.S.C. §§ 761-768 ("DOHSA") provides the exclusive remedy for wrongful deaths on the high seas. 3/ Suits under DOHSA are properly tried in admiralty without a jury. See Romero v. International Terminal Operating Co., 358 U.S. 354, 371, n. 28 (1959); see also Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958), cert. denied, 358 U.S. 838 (1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955), cert. dismissed, 352 U.S. 802 (1956); G. Gilmore & C. Black, The Law of Admiralty, 24 n. 79, 40 n. 133 (2d ed. 1975). 4/

---

3/ That is, DOHSA is the exclusive remedy for non-seamen. Seamen may also proceed under the Jones Act, 46 U.S.C. § 688. See, e.g. In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974), cert. denied sub nom. Monk v. Chambers & Kennedy, 423 U.S. 886 (1975).

4/ The widespread acceptance of this principle is demonstrated by the numerous district court decisions so holding. See, e.g., Kropp v. Douglas Aircraft Company, 329 F. Supp. 447 (E.D.N.Y. 1971); Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968); Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683 (N.D. Ill. 1964); Ridgedell v. Olympic Towing Corporation, 205 F. Supp. 952 (E.D. La. 1962); Blumenthal v. United States, 189 F. Supp. 439 (E.D. Pa. 1960), aff'd, 306 F.2d 16 (3d Cir. 1962); Kunkel v. United States, 140 F. Supp. 591 (S.D. Cal. 1956); Cunningham v. Bethlehem Steel Company, 231 F. Supp. 934 (S.D.N.Y. 1964); Iafrate v. Compagnie Generale Transatlantique, 106 F. Supp. 619 (S.D.N.Y. 1952); Egan v. Donaldson Atlantic Line, Ltd., 37 F. Supp. 909 (S.D.N.Y. 1941).

The exclusivity of DOHSA as the remedy for wrongful deaths on the high seas was also discussed and reaffirmed by this Court in the recent case of American Export Lines, Inc. v. Alvez, ___ U.S. ___, 100 S.Ct. 1673 (1980). The decision of the Fifth Circuit is in accordance with this Court's holding in Higginbotham and discussion in Alvez. Accordingly, the Petitioner cannot demonstrate that the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court, or that the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. This Court's holding in Higginbotham is controlling, and it was followed by the Fifth Circuit.

Furthermore, the Petitioner has specifically stated that in this suit she was not seeking to invoke substantive remedies available under non-statutory general maritime law (Petition, page 8), i.e. the Petitioner was not seeking to invoke the remedy created by Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). It is therefore difficult to understand the thrust of the Petitioner's assertion that her suit could have been brought in diversity.

In order to bring a suit in diversity, a plaintiff must have a cause of action and seek a remedy which could have, and would have, been pursued in a state court but for the fact that diversity of citizenship exists between the parties. In this case, the Petitioner states that she does not seek to invoke the general maritime non-statutory remedy (Moragne); neither does the Petitioner invoke any state wrongful death remedy. Therefore, DOHSA is the only remedy available to the Petitioner as a matter of fact, as well as as a matter of law under Higginbotham.

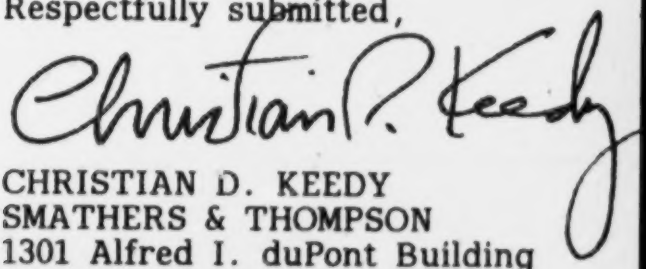
Since suits under DOHSA must be brought on the admiralty side of federal district court ( see authorities cited on page 11, supra), the Petitioner had no cause of action or remedy to pursue in a state court, or on the civil side of federal court by reason of diversity.

The issues involved in the Question Presented have already been decided by this Court, and the Fifth Circuit's decision is in complete accord with this Court's rulings. The Petitioner has not and cannot set forth a reason for granting a writ of certiorari which meets the standards set out in 28 U.S.C. Rules of the Supreme Court, Rule 19.

## CONCLUSION

The Petitioner has failed to present a proper record to this Court, has waived at the district court level the issue it now seeks to present, and has set forth no reason which meets the standards set forth in Rule 19 of the Rules of this Court for granting a review on writ of certiorari. The Respondent therefore respectfully prays that the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

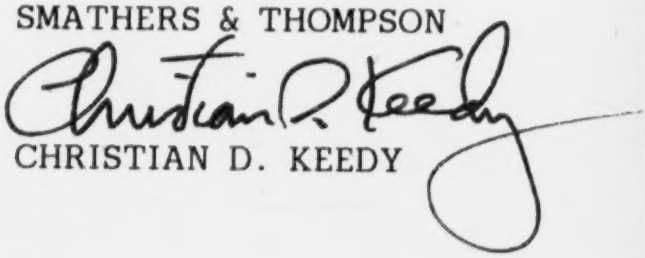


CHRISTIAN D. KEEDY
SMATHERS & THOMPSON
1301 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33131
Telephone: (305) 379-6523

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served by First Class U.S. Mail on all parties required to be served, to-wit: A. WARD WAGNER and RICHARD A. KUPFER, CONE, OWEN, WAGNER, NUGENT, JOHNSON, HAZOURI & ROTH, P.A., Attorneys for Petitioner/Plaintiff, 507 North Olive Avenue, P. O. Box 3466, West Palm Beach, Florida 33402, this 6th day of November, 1980.

SMATHERS & THOMPSON



CHRISTIAN D. KEEDY

# APPENDIX

# APPENDIX OF RESPONDENT


| Date Filed or Served | Instrument | |
|---|---|---|
| 1/24/79 | Plaintiff's Motion for Leave to File Amendment to Complaint . . . . . | A2 |
| 2/8/79 | Order on Plaintiff's Motion for Leave to File Amendment to Complaint, Defendant's Motion to Strike Plaintiff's Demand for Jury Trial, Defendant's Motion to Compel Production of Documents. . | A4 |
| 3/8/79 | Pretrial Stipulation . . . . | A6 |
| 8/20/80 | Decision of the United States Court of Appeals to the Fifth Circuit . . . . | A15 |
| 3/23/79 | Order on Plaintiff's Renewed Motion to Amend Her Complaint and Plaintiff's Motion to Amend Complaint to Bring a Pendant Claim . . . . . | A18 |

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090 Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

vs.

CARNIVAL CRUIST LINES, INC.,
Defendant.

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

(Served January 24, 1979)

Plaintiff, by and through her undersigned attorneys, move this Court for leave to file amendment to Complaint substituting in effect the following in lieu of paragraphs 2, 3 and 4 of said Complaint:

2. The Court has jurisdiction over this claim pursuant to 28 U.S.C.A. § 1332, Diversity jurisdiction.

3. The defendant, CARNIVAL CRUISE LINES, INC., is a foreign corporation with principal place of business in Miami, Dade County, Florida. The plaintiff's decedent was a resident of Forth Worth, Turrant County, Texas where her estate is being probated through her personal representative Amelia Flohr Heyl.

4. This is an action for the wrongful death of plaintiff's decedent, Nancy Zimmerman, and includes claims brought by the estate for estate losses and for decedent's children, Kim Ann Zimmerman, age 15; and Lisa Marie Zimmerman, age 10, per survivors.

As grounds for the above, plaintiff states that the allegations in previous paragraph 2 were inadvertently made and the justice of the cause so requires the amendment of paragraphs 2, 3 and 4.

MEMORANDUM OF LAW

Said amendment is proper under Rule 15(a) and Romero v Bethlehem Steel Corporation, 515 F 2d 1249, U.S.C.A. 5th, 7/21/75.

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished by mail, to Christian D. Keedy, Esquire, of SMATHERS & THOMPSON, 1301 Afred I. duPont Building, Miami, FL 33131, this 24th day of January, 1979.

Cone, Owen, Wagner, Nugent,
Johnson & McKeown, P.A.

507 North Olive Avenue
Post Office Box 3466
West Palm Beach, FL 33402
305/655-8100

Attorneys for Plaintiff

By /s/ Ward Wagner, Jr.
Ward Wagner, Jr.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090 Civ-CF

AMELIA FLOHR HEYL, as Representative of the Estate of Nancy Zimmerman,
Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed February 8, 1979)

Three motions are before the Court. Plaintiff seeks to amend her complaint. Defendant has moved to strike plaintiff's demand for a jury trial and to compel production of documents.

In her complaint, plaintiff described the action as one under the general maritime law for death proximately resulting from negligence on the part of the ship's doctor while the deceased was a passenger aboard the ship at sea. The plaintiff now seeks to amend her complaint so as to base jurisdiction on diversity of citizenship and to delete the allegations of the complaint which demonstrate maritime jurisdiction. Plaintiff relies on Romero v. Bethlehem Steel Corporation, 515 F.2d 1249 (5th Cir. 1975). Reliance on Romero is misplaced. Romero involved a claim for personal injury whereas the instant cause involves a claim for death resulting from negligence committed at sea. Plaintiff's exclusive remedy is under the Death on The High Seas Act, 46 U.S.C., §§ 761-

768. A suit for death on the high seas must be brought in admiralty, 46 U.S.C., § 761, and cases decided thereunder. See Dore v. Link Belt Co., 391 F.2d 671 (5th Cir. 1968)); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1956); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D.C. Del. 1964); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964); and First National Bank in Greenwich v. National Airlines, 288 F.2d 621 (2d Cir. 1961).

Because admiralty is the plaintiff's exclusive remedy, plaintiff's demand for a jury trial is improper. Inspection of the file discloses that plaintiff's motion to compel production should be granted.

For the reasons stated, it is

ORDERED and ADJUDGED as follows:

(1) Plaintiff's motion to amend her complaint in a manner to disclaim admiralty jurisdiction and to invoke diversity jurisdiction is denied.

(2) Defendant's motion to strike plaintiff's demand for jury trial is granted.

(3) Defendant's motion to compel production of documents is granted.

(4) This cause will be tried as previously set on April 3, 1979.

DONE and ORDERED at West Palm Beach, Florida this 8th day of February, 1979.

/s/ Charles B. Fulton
Senior U.S. District Judge

cc: Smathers & Thompson
Cone, Owen, Wagner, Nugent, et al.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 78-8090-Civ-CF

AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, minors,
Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

PRETRIAL STIPULATION

(Filed March 8, 1979)

COME NOW, the Plaintiff, AMELIA FLOHR HEYL, and Defendant, CARNIVAL CRUISE LINES, INC. by and through their undersigned counsel, and as required by Order of this Court submit their Pretrial Stipulation.

## I. NATURE OF THE ACTION

This is an action for the wrongful death of NANCY HEYL ZIMMERMAN, alleged to have been caused by the medical malpractice of the ship's doctor aboard the TSS CARNIVALE in April of 1977.

## II. BASIS OF FEDERAL JURISDICTION

A. 28 U.S.C. § 1333, Admiralty and maritime case;

B. Rule 9(H) of the Federal Rules of Civil Procedure;

C. 46 U.S.C. § 761, Death on the High Seas by Wrongful Act;

D. Alleged tortious conduct occurred on the high seas;

E. Suit in admiralty.

## III. PLEADINGS RAISING ISSUES

A. Plaintiff's original Complaint;

B. Answer and Affirmative Defenses;

C. Plaintiff's denial of Defendant's Affirmative Defenses;

## IV. UNDISPOSED OF MOTIONS

[None.]

## V. STIPULATED FACTS

A. On April 9, 1977, Plaintiffs decedent boarded the TSS CARNIVALE, which ship was operated by CARNIVAL CRUISE LINES, INC., in April of 1977.

B. Nancy Zimmerman was a fare-paying passenger aboard the TSS CARNIVALE.

C. Upon becoming ill, Nancy Zimmerman was examined and treated by the ship's physician.

D. On April 11, 1977, Nancy Zimmerman expired.

E. Nancy Zimmerman was survived by two daughters, Kim Ann Zimmerman and Lisa Marie Zimmerman.

F. AMELIA FLOHR HEYL is the administratrix of the estate of Plaintiff's decedent.

G. Nancy Zimmerman was born on January 14, 1935.

H. Kimberly Ann Zimmerman was born on May 2, 1962.

I. Lisa Marie Zimmerman was born on February 18, 1968.

J. At the time of Nancy Zimmerman's death, she was employed by the First National Bank of Euless, Euless, Texas, where she began employment on March 10, 1975, at a salary of $425 (gross) per month.

K. On July 15, 1975, she received a raise to $440 (gross) per month.

L. On January 1, 1976, she received a salary increase to $455 (gross) per month.

M. On January 1, 1977, she received a salary increase to $470 (gross) per month, which was her salary at the time of her death.

N. From November, 1972, to April, 1977, her adopted father, Burt Heyl, gave Nancy Zimmerman a total of $34,334.77. (See Plaintiff's response to Defendant's Interrogatory #5)

O. On May 21, 1973, Nancy Zimmerman was divorced from Richard Zimmerman, and custody of Kimberly Ann Zimmerman and Lisa Marie Zimmerman was awarded to Nancy Zimmerman, and Richard Zimmerman was ordered to pay monthly child support for each daughter in the amount of $105.

P. On August 17, 1976, by order of the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, Richard Zimmerman was awarded custody of Kimberly Ann Zimmerman and prior child support awarded to Nancy Zimmerman for this daughter was cancelled.

Q. Subsequent to the spring of 1976, Kim Ann Zimmerman resided with her father in Illinois. (This stipulation does not preclude the Plaintiff from offering evidence that this daughter visited her mother subsequent to that date)

R. At all times subsequent to Richard Zimmerman's divorce of Nancy Zimmerman, he paid all doctor and dentist bills for Lisa Marie and Kim Ann Zimmerman.

S. Subsequent to the divorce in 1972, Richard Zimmerman paid expenses associated with the formal education of both Lisa Marie and Kim Ann Zimmerman.

NOTE: The Plaintiff, although agreeing to the facts set out in "N", "O", and "P" above, asserts that these facts are not relevant or material to issues to be presented to the Court in this case. The Defendant's position is to the contrary.

## VI. FACTS NOT ADMITTED BUT WHICH ARE NOT CONTESTED

None.

## VII. ISSUES OF FACT WHICH REMAIN TO BE LITIGATED

A. Alleged negligence of Defendant;

1. Whether the ship's physician failed to properly and timely diagnose Nancy Zimmerman's condition;

2. Whether the Defendant was negligent in hiring Dr. Dreize;

3. Whether the TSS CARNIVALE was unseaworthy in not being properly equipped to care for Nancy Zimmerman.

4. Whether the Defendant failed to provide proper medical care to Nancy Zimmerman;

5. Whether the Defendant failed to provide adequate equipment and personnel to adequately diagnose and treat Nancy Zimmerman;

B. Defendant's Affirmative Defenses:

1. Time and cause of Nancy Zimmerman's death;

2. Whether Dr. Dreize negligently failed to diagnose the cause of Nancy Zimmerman's death;

3. Whether any act or omission of Dr. Dreize proximately caused and/or contributed to Nancy Zimmerman's death;

4. Whether the medical care given to Nancy Zimmerman while aboard the TSS CARNIVALE was reasonable under the circumstances;

5. Whether the medical care given to Nancy Zimmerman while aboard the TSS CARNIVALE consisted of the exercise of the degree of care and skill which physicians in the same type of practice ordinarily exercise in like cases;

6. Whether the medical care given to Nancy Zimmerman aboard the TSS CARNIVALE caused and/or contributed to her death;

7. Whether Dr. Dreize's failure, if such is proved to exist, to diagnose the cause of Nancy Zimmerman's death, proximately caused or contributed to her death.

8. Whether Nancy Zimmerman's negligence and/or other fault was the cause of her death;

9. Whether Nancy Zimmerman was Contributorily negligent;

10. Whether Nancy Zimmerman failed to give Dr. Dreize an accurate history (comparative negligence);

11. Whether Nancy Zimmerman failed to cooperate with Dr. Dreize and/or Nurse Rubins in their medical treatment of her (comparative negligence);

12. Whether Carnival Cruise Lines is legally liable to the Plaintiff for the acts and/or omissions of Dr. Dreize;

13. The nature and amount of damages which the Plaintiff has sustained, if any.

## VIII. ISSUES OF LAW ON WHICH THERE IS AGREEMENT

A. This action is brought pursuant to the Death on the High Seas Act, 46 U.S.C. § 761-768;

B. The law applicable to damages is governed by 46 U.S.C. § 761-762;

C. The law applicable to comparative negligence is governed by 46 U.S.C. § 766;

D. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are applicable to this case.

E. The doctrine of comparative negligence applies here.

## IX. ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY COURT

A. Whether Nancy Zimmerman was entitled to a "warranty of seaworthiness";

B. Whether as a matter of law Carnival Cruise Lines would be responsible for the negligence of Dr. Dreize.

## X. SCHEDULE OF EXHIBITS AND OBJECTIONS BY COUNSEL

A. Plaintiff's Exhibits';

B. Defendant's Objections to Plaintiff's Exhibits;

C. Defendant's Exhibits;

D. Plaintiff's Objections to Defendant's Exhibits.

## XI. SCHEDULE OF WITNESSES

See attached lists of Plaintiff and Defendant.

## XII. ATTORNEYS TO TRY THE CASE ARE:

A. John F. Romano, Esq. and Ward Wagner, Jr., Esq., Cone, Owen, Wagner, Nugent, Johnson & McKeown, P.A. for Plaintiff;

B. Christian D. Keedy, Esq., and Elizabeth Hook, Esq., Smathers & Thompson, for Defendant.

XIII. ESTIMATED TRIAL TIME

Four-Five days.

XIV. DISCOVERY
OPEN UNTIL 29 MARCH, 1979

XV. EXPERT REPORTS TO BE
EXCHANGED AND/OR DEPOSITIONS TAKEN

SMATHERS & THOMPSON
Attorneys for Defendant
1301 A.I. duPont Building
Miami, Florida 33131
(305) 379-6523

By /s/ Christian D. Keedy
Christian D. Keedy

DATED: March 7, 1979

CONE, OWEN, WAGNER,
NUGENT, JOHNSON &
McKEOWN, P.A.
Post Office Box 3466
West Palm Beach, Fl. 3340
(305) 655-8100

By /s/ John F. Romano
John F. Romano

DATED: March 12, 1979

NOTE: The additional pages of the Pretrial Stipulation consisting of Witness and Exhibit Lists (R. 217-225) have been omitted from this Appendix.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 79-3957
Summary Calendar*

---

AMELIA FLOHR HEYL, as Personal Representative of the Estate of NANCY ZIMMERMAN, Deceased, and AMELIA FLOHR HEYL, as Guardian of KIM ANN ZIMMERMAN and LISA MARIE ZIMMERMAN, minors,
Plaintiff-Appellant,

versus

CARNIVAL CRUISE LINES, INC.,
Defendant-Appellee.

---

Appeal from the United States District Court
for the Southern District of Florida

---

(August 20, 1980)

Before TJOFLAT, FRANK M. JOHNSON, JR. and GARZA, Circuit Judges.

PER CURIAM:

On April 9, 1977, Nancy Zimmerman, age 42, boarded the Appellee's luxury cruiseliner, the

---

*Fed. R. App. P. 34(a); 5th Cir. R. 18.

TSS Carnivale. She was a farepaying passenger taking a pleasure cruise out of the Port of Miami. Mrs. Zimmerman became ill, and was examined and treated by the ship's physician. On April 11, she was discovered dead in her cabin. The Carnivale was on the high seas.

This suit was filed by Amelia Flohr Heyl as Administratrix of Mrs. Zimmerman's estate and guardian of her two daughters. In the original complaint, Plaintiff alleged the Death on the High Seas Act [DOHSA], 46 U.S.C. § 761 et seq., and the General Maritime Law as bases of federal jurisdiction. A jury trial was requested. In its answer, Defendant Carnival denied the allegations of jurisdiction except as they pertained to admiralty and maritime jurisdiction.

Plaintiff subsequently filed a motion seeking leave to amend the complaint to substitute diversity as the basis of federal jurisdiction. The Defendant opposed the motion and the District Court ruled that Plaintiff's exclusive remedy was under DOHSA, thus being in admiralty and a nonjury matter. Leave to amend was denied.

Pursuant to a pretrial order, the parties' counsel jointly prepared and filed a pretrial stipulation. The Plaintiff and Defendant stipulated admiralty as the basis of federal jurisdiction, and DOHSA as the controlling law.

After a bench trial, the district found for the Defendant, stating that Plaintiff had failed to prove that the Defendant or its agents were guilty of negligence which caused the death of the Plaintiff's decedent.

Plaintiff filed a motion for a new trial, solely on the basis of the District Court's denial of the motion to amend to allege diversity jurisdiction.

The motion for new trial was denied, and Plaintiff appeals. We affirm.

In Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), the Supreme Court held that DOHSA provides the exclusive remedy for death on the high seas. See also Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71, 75 (5 Cir. 1980). The District Court did not err in overruling the motion for leave to amend. Since this was, accordingly, a DOHSA case, it was properly tried in admiralty without a jury. See Romero v. International Terminal Operating Co., 358 U.S. 354, 371, n. 28 (1959).

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 79-8090-Civ-CF

AMELIA FLOHR HEYL, etc.,
Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER

(Filed March 23, 1979)

This cause is before the Court on plaintiff's motions to amend her complaint. Each motion is addressed seriatim.

PLAINTIFF'S RENEWED MOTION
TO AMEND HER COMPLAINT

At the pre-trial conference in this cause, plaintiff orally renewed her motion to amend her complaint. An earlier motion by plaintiff to amend here complaint to bring this action under diversity jurisdiction and to try the case to a jury was denied by this Court on February 8, 1979. At the pre-trial conference, plaintiff's counsel renewed the motion to amend, however, this time seeking to bring the action under "general maritime law," and to try the cause to a jury.

Plaintiff's renewed motion to amend her complaint is, in effect, a renewed request for a trial by jury. Plaintiff has already plead general

maritime jurisdiction, and the parties have stipulated that that is a basis for jurisdiction in this cause. Under the doctrine of Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), a federal remedy for wrongful death does exist under general maritime law. The question presently before the Court is whether plaintiff is entitled to a jury trial in an action for wrongful death brought under the general maritime law.

In 1920 Congress enacted the Death on the High Seas Act (DOHSA), 41 U.S.C. § 761 et seq., with the intent of creating a remedy for wrongful deaths more than three miles from shore. The Act did not address claims arising in territorial waters, and such claims were governed by state wrongful death statutes. This resulted in a lack of uniformity and a general uncertainty in the law, in that different sbustantive rules applied depending upon whether a claim arose in territorial waters or on the High Seas. In an effort to resolve this inconsistency, the Court in Moragne established a right of action under general maritime law when a wrongful death occurred in territorial waters. Subsequent decisions in this Circuit have extended the Moragne doctrine to wrongful death claims arising on the high seas as well as in territorial waters. See Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975).

However, wrongful death claims brought under general maritime law have no greater rights than those under DOHSA. In Green v. Rosai, 481 F.2d 102 (5th Cir. 1973), the Court considered the question of plaintiff's right to a jury trial in a Moragne action and concluded that a jury trial was not available unless some independent jurisdictional base could be established. Id at 103. More recently, the Supreme Court employed a similar rationale in holding that no

greater damages are available in a Moragne wrongful death claim than in a DOHSA claim, Mobil Oil Corp. v. Higginbotham, 98 S.Ct. 2010 (1978). The Court in Higginbotham concluded:

> In the area covered by the statute, [the DOHSA] it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

It is equally inappropriate to permit a jury trial in a Moragne claim, when one is not available in a DOHSA claim. Plaintiff's renewed motion to amend is therefore denied. The Court's Order of February 8, 1979 is, however, amended to delete the reference to the Death on the High Seas Act as the plaintiff's exclusive remedy. The remedy under DOHSA is co-extensive with the general maritime remedy afforded by Moragne. Neither avenue of relief affords plaintiff a jury trial.

PLAINTIFF'S MOTION TO AMEND COMPLAINT TO BRING A PENDANT CLAIM

At the pre-trial conference, plaintiff filed a motion seeking to amend her complaint to include a claim for the decedent's pain and suffering. Plaintiff relies on Solomon v. Warren, 540 F.2d 777, 792 (5th Cir. 1976) in support of her motion. In the Solomon case the claim for pain and suffering was brought under Florida Statute 46.021 as a pendant claim to plaintiff's claim under DOHSA. In the present case, as in Solomon, a claim for pain and suffering would have to be brought as a separate claim, invoking pendant jurisdiction. It is not simply an additional "element of damage" as plaintiff's memorandum suggests.

Defendant opposes plaintiff's motion on the grounds that the insertion of an additional claim, requiring additional discovery, would be prejudicial at this stage of the law suit.

The Court finds defendant's argument persuasive. The complaint in this cause was filed nearly one year ago. The case has been at issue for over seven months. A pre-trial stipulation has already been filed by the parties limiting the issues to those raised by the original complaint and answer. To add a pendant state law claim raising new issues and further discovery on the eve of trial would disrupt and delay the trial of this cause.

Accordingly, for the reasons set forth herein, it is

ORDERED and ADJUDGED that plaintiff's motions to amend her complaint are denied.

DONE and ORDERED at West Palm Beach, Florida, this 23 day of March, 1979.

/s/ Charles B. Fulton
Senior District Judge

cc: Cone, Owen, Wagner, et al.
Smathers & Thompson